served that petitioner's argument, if taken to its logical conclusion, "would demolish * * * the whole system of agricultural subsidies," since "if it is unduly 'coercive' to link agricultural subsidies to how the farmer uses (or misuses) agricultural land, it must be unduly 'coercive' to link the subsidy to the agricultural product." *Id.* at 7a.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Relying on dicta in *Gunn* v. *United States Department of Agriculture*, 118 F.3d 1233 (8th Cir. 1997), cert. denied, 522 U.S. 1111 (1998), and *Barthel* v. *United States Department of Agriculture*, 181 F.3d 934 (8th Cir. 1999), petitioner contends that "[t]he Eighth Circuit's opinions stand in marked contrast to the Seventh Circuit's decision below, because the Eighth Circuit may have ultimately permitted the Petitioner's activities on his farmland." Pet. 14; see Pet. 10-15 (alleging the existence of a circuit conflict on the question presented here). Petitioner's reliance on *Gunn* and *Barthel* is misplaced. Neither of those decisions construed 16 U.S.C. 3822(b)(2)(D) or its key phrase "that date," and the reasoning of the Eighth Circuit in *Gunn* and *Barthel* is

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[1] In addition, the court of appeals held that petitioner had received constitutionally adequate opportunities for administrative review of the USDA district conservationist's converted-wetlands determination, particularly since the dispute between the parties was legal rather than factual, Pet. App. 8a-9a; and that the Secretary's denial of continued farm-subsidy payments to petitioner did not implicate 5 U.S.C. 558, which deals with applications for federal "licenses," Pet. App. 9a-11a. Petitioner does not challenge those holdings in this Court.

fully consistent with the Seventh Circuit's analysis in this case.

a. *Gunn* involved a 160-acre tract in Iowa. 118 F.3d at 1235. Until 1906, "the acreage was wetlands and not arable." *Ibid.* A drainage system installed in 1906 allowed some cultivation to take place, and improvements performed in 1992 by the local drainage district increased the amount of land that could be used for agricultural purposes. *Id.* at 1235-1236. Based on those improvements, USDA "concluded that 28.2 acres of Gunn's land were wetlands that had been converted by the drainage district's recent [1992] activities and could not be farmed by Gunn without his losing eligibility for farm benefit programs." *Id.* at 1236.

In challenging USDA's determination, Gunn argued, *inter alia*, that he was entitled to an exemption under 16 U.S.C. 3822(b)(1)(A), which states that use of converted wetlands for agricultural production shall not disentitle a person to farm subsidies "if the conversion of the wetland was commenced before December 23, 1985." 118 F.3d at 1238. Gunn contended that, because the land was initially drained for agricultural purposes in 1906, "the land became 'converted wetland' before December 23, 1985, and remains in that classification forever, whatever may have happened later." *Ibid.* The court of appeals rejected that claim, deferring to USDA's view that the 28.2 acres "did not become converted wetland until 1992," when the 1992 improvements to the drainage system "further degraded the wetland characteristics of the farm." *Ibid.* The court explained that USDA's interpretation of Section 3822(b)(1)(A) was "sufficiently plausible to meet the *Chevron* test" and "also accord[ed] with the general purpose of the

statute—to preserve those wetland characteristics still in existence in 1985." *Ibid.*

Thus, like the Seventh Circuit in the instant case, the Eighth Circuit in *Gunn* recognized that USDA's reasonable interpretation of ambiguous Swampbuster provisions is entitled to deference. The Eighth Circuit's observation that "the general purpose of the statute [is] to preserve those wetland characteristics still in existence in 1985," 118 F.3d at 1238, also accords with the Seventh Circuit's understanding. Compare Pet. App. 5a (noting with approval that, under USDA's interpretation of 16 U.S.C. 3822(b)(2)(D), that provision "is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production"). Petitioner's claim of a circuit conflict is therefore unfounded.

b. Petitioner's reliance on *Barthel* is similarly misplaced. The Eighth Circuit in *Barthel* held that USDA had acted unlawfully by refusing to allow landowners to deepen a drainage ditch. See 181 F.3d at 935-939. Under the approach taken by the agency in that case, the landowners were required to maintain the ditch at its December 23, 1985, depth, even though leaving the ditch at that level resulted in the flooding of land that had been suitable for farming as of 1985. See *id.* at 937. In the court of appeals' view, that approach "misse[d] the clear focus [of] the Swampbuster provisions and the implementing regulations." *Ibid.* The court explained:

> The unambiguous focus of the statute and implementing regulations is to maintain the status quo of the manipulated wetlands—not the drainage ditch. And a technical determination that establishes the

> level of a culvert in a ditch, but which produces a result contrary to the previous status quo of the wetlands cannot stand. The statute and regulations mandate that the Barthels should be able to have the water and farming regime they had before December 23, 1985.

Id. at 938 (footnote omitted). The Eighth Circuit's analysis in *Barthel*, which was premised on the view that the Swampbuster provisions are intended to preserve but not expand wetland acreage (as compared to the December 23, 1985, baseline), is fully consistent with the Seventh Circuit's decision in the instant case. See pp. 9-10, *supra*.

2. Petitioner contends (Pet. 15-20) that the court of appeals' application of *Chevron* principles warrants review by this Court. That contention lacks merit.

In *Chevron*, this Court held that,

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-843. Consistent with those principles, the Seventh Circuit explained that, because the disputed Swampbuster provision is ambiguous, Pet. App. 4a, and because the Secretary's interpretation of that provision "is expressed in regulations adopted after notice and opportunity for comment and concerns the Secretary's

administration of a federal program," *id.* at 5a (citations omitted), that interpretation "receives all of the deference contemplated by *Chevron*," *ibid.* Applying that deferential standard, the court correctly sustained the agency's approach, finding it to be not only reasonable, but "the most sensible understanding of the legislation." *Ibid.*

Petitioner does not dispute the Seventh Circuit's conclusion that the relevant statutory language is ambiguous. Petitioner does argue (Pet. 17-20) that the court of appeals erred in its understanding of the history of 16 U.S.C. 3822(b)(2)(D). The court of appeals, however, correctly concluded that the only aspect of the legislative history that even relates to the Swampbuster program—then-Representative Daschle's general statement at the time the 1985 Act was passed—was not entitled to any significant weight because it occurred 11 years before the particular exemption at issue here was enacted in 1996. See Pet. App. 5a-6a.

In any event, petitioner does not contend that the court of appeals misstated the legal standards governing judicial review of federal agency action. Nor does petitioner claim that any other court of appeals has rejected the Secretary's interpretation of Section 3822(b)(2)(D) or construed that provision in a different manner. Because petitioner has failed to identify a circuit conflict or any recurring question of broad legal importance, its challenge to the court of appeals' application of *Chevron* principles does not warrant this Court's review.

3. Petitioner contends (Pet. 20-30) that further review is warranted to "clarify" (Pet. 20) the scope of Congress's authority under the Spending Clause to condition the receipt of federal funds upon compliance

with statutory requirements. That contention lacks merit.

The Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, Cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds." *Dole*, 483 U.S. at 206; see *New York* v. *United States*, 505 U.S. 144, 167 (1992). This Court has made clear that the spending power is "not limited by the direct grants of legislative power found in the Constitution," but can be used to achieve broad policy objectives beyond Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (citations omitted).

Although conditions imposed on the receipt of federal funds generally raise no constitutional concern, the Court in *Dole* identified four limitations on Congress's spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Dole*, 483 U.S. at 207 (quoting U.S. Const. Art. I, § 8, Cl. 1). Second, if Congress imposes conditions on a State's receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this Court's decisions "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Ibid.* (internal quotation marks omitted). Fourth, the obligations imposed by Congress may not violate any independent constitutional provisions, *id.* at

208—a limitation that reflects "the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional," *id.* at 210.

Petitioner does not contend that the Swampbuster provisions at issue in this case run afoul of any of the foregoing limitations on Congress's spending authority. Rather, petitioner argues (Pet. 22-24) that Congress has impermissibly "coerced" it to refrain from converting wetlands to agricultural uses by conditioning the grant of federal farm subsidies on compliance with the Swampbuster provisions. This Court's decisions "have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).[2] The Court has not suggested, however, that conditions on the receipt of federal funds can be declared invalid simply because potential recipients find the federal offer too tempting to decline. As the Court recognized in *Dole*, every federal spending statute "is in some measure a temptation." *Ibid.* (quoting *Steward Mach. Co.*, 301 U.S. at 589). But "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless diffi-

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[2] The Court in *Dole* made that observation in the course of reviewing conditions on grants of federal money to States. In her dissenting opinion in that case, Justice O'Connor expressed the view "that the spending power may not be used in a way that coerces states to surrender fundamental attributes of their sovereignty." Pet. App. 7a (citing *Dole*, 483 U.S. at 212-218 (O'Connor, J., dissenting)). As the court of appeals observed, that concern is inapplicable here, since petitioner "is not a governmental body and lacks any sovereignty that can be trampled upon." *Ibid.*

culties." *Ibid.* (quoting *Steward Mach. Co.*, 301 U.S. at 589-590).

Petitioner cites no decision of this Court that has struck down a condition on federal spending as impermissibly coercive.[3] Petitioner identifies only one court of appeals decision that has invalidated a spending condition on that ground, see Pet. 26-27 (citing *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757-758 (8th Cir. 1999)), and petitioner acknowledges that the panel decision in *Bradley* has been superseded by the contrary holding of the Eighth Circuit sitting en banc, see Pet. 27 (citing *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001)). As the Ninth Circuit has observed, "[t]he coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." *Nevada* v. *Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990); see, *e.g.*, *Doe* v. *Nebraska*, 345 F.3d 593, 598-600 (8th Cir. 2003); *West Virginia* v. *United States Dep't of Health & Human Servs.*, 289 F.3d 281, 291-292 (4th Cir. 2002); *Jim C.*, 235 F.3d at 1082; *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("[T]he coercion theory is unclear, suspect and has little precedent to support its application."), cert. denied, 531 U.S. 1035 (2000). Petitioner's conjecture (Pet. 28) that "the result in this case may certainly have been different" if the dispute had arisen in the Fourth Circuit provides no basis for review by this Court.

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[3] In light of the more recent pronouncements of this Court and other federal courts, petitioner's reliance (Pet. 24-25) on dicta in *United States* v. *Butler*, 297 U.S. 1, 70-71 (1936)—a decision based on the Tenth Amendment rather than on the Spending Clause (see Pet. 24)—is misplaced.

Petitioner's "coercion" argument is especially misguided, moreover, because it is inconsistent with the core premise of the federal farm subsidy programs from which petitioner seeks to benefit. The legitimacy of those programs depends entirely on the proposition that a grant of federal funds may be conditioned on the recipient's agreement to devote his land to the particular (*i.e.*, agricultural) uses that the programs are designed to foster. As the court of appeals explained:

> [I]f it is unduly "coercive" to link agricultural subsidies to how the farmer uses (or misuses) agricultural land, it must be unduly "coercive" to link the subsidy to the agricultural product. A farmer can't get federal payments for growing (or not growing) soybeans, without actually growing the soybeans or allowing the land to lie fallow. The sort of argument [petitioner] presses would demolish, not the Swampbuster legislation, but the whole system of agricultural subsidies.

Pet. App. 7a.

Petitioner thus seeks the best of both worlds. Petitioner contends that Congress, in dispensing federal money, cannot constitutionally distinguish between farmers who comply with limits on wetland conversion and farmers who do not. Petitioner's ultimate objective, however, is to benefit financially from a federal subsidy program that favors agricultural over non-agricultural uses of land. Neither precedent nor logic suggests that the Constitution bars Congress from utilizing the former funding criterion while allowing it to use the latter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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